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NO. 78449-3

SUPREME COURT
STATE OF WASHINGTON

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH
GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of
the class of all persons similarly situated,

Appellants,

vs.

THE CITY OF SEATTLE, THE CITY OF SHORELINE, THE CITY OF
BURIEN, THE CITY OF LAKE FOREST PARK, THE CITY OF
SEATAC and THE CITY OF TUKWILA,

Respondents.

BRIEF OF RESPONDENTS CITIES OF BURIEN, SHORELINE, LAKE
FOREST PARK, SEATAC, AND TUKWILA

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I. INTRODUCTION

This case involves the lawfulness of payments made by Seattle City Light (“SCL”) pursuant to a service agreement negotiated in association with franchise agreements (the “Franchise”) between SCL and the cities of Shoreline, Lake Forest Park, Burien, SeaTac and Tukwila (“collectively referred to as the “Suburban Cities”). The service agreement provides for payments from SCL to the Suburban Cities in consideration for the Suburban Cities’ forbearance from exercising its authority to form an electrical utility and acquire SCL assets in the cities’ rights-of-way. CP 1571-1632; CP 368-387. Appellants claim payments made by SCL to the Suburban Cities are illegal because RCW 35.21.860 forbids a city from imposing a fee or charge upon an electrical utility for a right-of-way franchise. CP 403.

Appellants’ argument is in error, however, as this service agreement was negotiated by the parties and the payments are supported by lawful consideration. Neither the service agreement nor the payments were unilaterally imposed by the Suburban Cities; therefore, neither is prohibited by RCW 35.21.860.

Appellants do not dispute that the service agreement included in the Franchise was the product of extensive, arm’s-length negotiation.

Appellants' Brief at 9-16. Instead, Appellants claim the payments made by SCL constitute illegal "franchise fees" merely because they were made in connection with the SCL Franchise. Essentially, Appellants are asking this Court to declare that any payment made by an electric utility to a city in association with a franchise is illegal as a matter of law, whether imposed or negotiated, unless specifically authorized by RCW 35.21.860(1)(a)-(e).

Appellants ignore the plain language of RCW 35.21.860, which is limited in scope to prohibiting the unilateral imposition of fees or charges upon an electric utility for use of a city's rights-of-way. Appellants' unsupported interpretation of RCW 35.21.860 also conflicts with the Suburban Cities' express statutory authority to negotiate and enter into agreements establishing terms and conditions regarding the establishment of municipal utility enterprises or forbearance from exercising rights to create such enterprises.

II. STATEMENT OF ISSUES

1. Whether RCW 35.21.860 prohibits cities and electrical utilities from negotiating, in association with a franchise, service agreements providing for payments in return for lawful consideration.
2. Whether the trial court correctly limited the representative class to Seattle ratepayers.

III. STATEMENT OF THE CASE

A. Factual Background.

In the early 1990's, as more and more unincorporated areas served by SCL began incorporating, issues arose regarding the service provided by SCL to these suburban cities. There were many topics of discussion about this issue in the various city halls – the amount of revenue lost to Seattle by not having their own utility, the utility tax collected from Suburban Cities residents benefiting Seattle's general fund,¹ the quality of services provided by SCL, as well as the rates charged. CP 1473-1475, 1476, 1482-1486. All of these issues were important to these suburban cities.

At this time of unrest in the suburban cities, SCL was facing challenges of its own. The deregulation of electric power was a very real concern during this period. Utilities are capital-intensive enterprises and planning for distribution facilities and power supplies is a very complex issue. CP 1530-1506, 1509-1510, 1514-1516. The recovery of the large

¹ This concern was heightened because the Suburban Cities could not impose a utility tax on SCL (a municipal utility), while such a tax could be imposed on private utilities operating within the Suburban Cities' borders. CP 588; CP 641. The apparent purpose of RCW 35.21.860 is to prevent cities from "double dipping" by imposing both a utility tax and a franchise fee. An anomaly arises because the Suburban Cities cannot tax SCL or unilaterally impose a franchise fee, thereby giving municipal electrical utilities a competitive advantage over private utilities while allowing them to collect a utility tax from customers who do not live in the city that owns the utility and who do not receive the benefits of the utility tax in the form of city services.

investments necessary to support capital projects generally takes decades to recover. *Id.* Further, if deregulation were to occur, SCL's power supply was at risk, particularly over the length of time for which SCL might have an obligation to serve. The uncertainty of the Suburban Cities' continued relationship with SCL, in this environment, was of particular concern. Thus, contractual relationships, as embodied in a franchise agreement, solidifying the relationship with the Suburban Cities was of great value to SCL. *Id.* In addition, SCL had long-term financial plans that included continued service to the Suburban Cities. If these accounts were lost it would have had a significant impact on the fiscal plans of SCL. CP 1517-1520. This is the climate that brought these parties to the negotiating table, for a long and difficult process of compromising fundamental questions of equity and long term objectives of SCL and the Suburban Cities. As with most processes of municipal government, these negotiations were an iterative process. Several goals were identified and the challenge for the Suburban Cities was how to achieve these goals in a manner which best served their citizens. CP 1521-1524; CP 1706 at ¶ 3. Many ideas were discussed by the Suburban Cities, including revenue generation, tax inequity, collecting a tax on SCL, forming their own utility thereby gaining taxing authority, and other options. CP 1527, 1529, 1532-1546; CP 1706 at ¶ 5. Some of these ideas might have been contrary to

statutory or decisional law and were discarded once fully explored and debated by the negotiating team. CP 1547-1552.

SCL wanted to ensure a long-term relationship with these cities and it knew that the right to form their own utility was an absolute right that had significant value, both in terms of revenue generation for the cities as well as addressing service issues. Thus, SCL knew this was the ultimate trump card for the suburban negotiating team. In fact, some cities raised the municipalizing of the electric utility in very concrete terms during the negotiation. CP 1553-1562; CP 1706 at ¶ 8.

As detailed in Appellants' Brief, after a very lengthy and contentious negotiation session, SCL and the City of Shoreline ultimately agreed to a service agreement to be incorporated into the Franchise. Appellants' Brief at 9-16. The agreement negotiated between Shoreline and SCL formed the basis for the agreements with the remaining Suburban Cities, with minor modifications. CP 1563-1565; 1568-1570.

A material term called for payments to be made by SCL to the Suburban Cities in consideration for the Suburban Cities not forming their own municipal electrical utility, thus preserving SCL's exclusive service in their respective communities:²

² Since the consideration terms in the various franchise agreements are substantially similar, for ease of reference they will be collectively referred to as Section 4.

4. Consideration. It is recognized by the City and by Seattle City Light that the City has the authority to establish its own municipal electric utility, and the authority to acquire SCL electric distribution properties in the City for that purpose.

4.1 In consideration for the City **agreeing not to exercise such authority during the term of this franchise**, SCL agrees to the following:

4.1.1 SCL shall pay the City six percent of the amount of revenue derived from the power portion of SCL service to customers in the City, and shall pay the City zero percent of the amount of revenue derived from the distribution portion of SCL service to customers in the City. The City retains the authority to change the above percentages, to a maximum of six percent on the power portion of SCL service and to a maximum of six percent on the distribution portion of SCL service during the course of the franchise upon one year written notice to SCL.

CP 1576-1577 (emphasis added).

This contract term is of such significance to the Suburban Cities that the entire agreement can be terminated if the underlying consideration is declared invalid, in which case the cities would be once again free to start their own electrical utility. Section 4.3 of the Franchise provides:

Should a court of competent jurisdiction declare the consideration to be paid to the City in Section 4.1.1 above invalid, in whole or in part, or should a change in law make the consideration to be paid to the City in Section 4.1.1 above invalid, in whole or in part, this entire Agreement may be terminated by the City at any time thereafter upon 180 days written notice. During such notice period, however, SCL and the City shall attempt to agree upon acceptable, substitute provisions. *Id.*

B. Background by City.

1. The City of Shoreline.

Shoreline was incorporated as a city August 1, 1995 and from that date to the present SCL has been the sole provider of electricity to Shoreline's citizens. When Shoreline incorporated, a first order of business for the new City Council was to examine options for continued utility services. The SCL Franchise with Shoreline had expired and Shoreline used this hiatus as an opportunity to address three fundamental concerns: 1) the future of electrical service to residents under the anticipated new environment of electrical deregulation; 2) increased rates from SCL to outside electrical customers by SCL to mitigate escalating wholesale power costs; and 3) inequity in the state taxing scheme that made taxation of SCL by Shoreline open to question while limiting franchise fees on electrical providers. CP 1026 at ¶ 6.

During 1997 and 1998, the City hired the Charlie Earl Company and EES, Inc. as consultants to help the Council explore its electrical utility options. The consultants prepared a profile of Shoreline's service area, loads and customers; met with four to six electrical service providers to discuss costs and rates, process, timing and risks; studied the feasibility and cost of duplication, purchase or condemnation of the SCL system; conducted an extensive Request for Proposals to provide power and operation of a Shoreline electrical utility; and conducted a workshop for several suburban cities interested in forming their own electrical utility to replace SCL operations. CP 1720-1722; CP 1026-27 at ¶ 8.

At first, the City was successful in obtaining some concession from SCL in recognizing Shoreline's need to be compensated for not forming its own utility. With a change in SCL's administration this commitment was withdrawn, and the City more vigorously pursued legislative measures to correct the utility tax inequity as well as explored the idea of forming its own electrical utility.

Based on SCL's desire to resolve the fundamental issues in service delivery with all suburban cities served by SCL, the parties solicited the services of Stan Finkelstein, the Executive Director of the Association of Washington Cities (AWC). Mr. Finkelstein transmitted a memorandum outlining a tentative agreement reached by the parties on service and

compensation questions in October 1998. CP 1739-1741. Of importance in this case is the parties' agreement that:

[t]he agreement will also address payments which SCL will agree to make to suburban cities, in an amount and on a schedule to be agreed upon between SCL and each individual suburban city, in exchange for certain assurances from suburban cities that are of value to Seattle City Light. Those assurances would include, but not be limited to, an agreement not to municipalize electric service within their cities. CP 1740.

The final phase of negotiations is detailed in a staff report of December 7, 1998 recommending Ordinance No. 187 be adopted, thereby reaching an accord with SCL. CP 1742-1748. The staff report presenting the final agreement with SCL summarized the key issues and objectives that had been identified almost two years earlier and how they had been resolved in the proposed Franchise. Specifically, it identifies Section 4 of the Franchise as the compromise reached on the utility tax inequity and potential discriminatory rate differentials for Suburban Cities, both priority concerns in allowing SCL operations to continue in lieu of a suburban utility.³ CP 1746-47.

³ "Section 4. This section articulates the agreements reached through the AWC facilitated negotiation process. Generally this section provides that in consideration of the City's commitment not to municipalize electric services, SCL will make certain payments to Shoreline and will limit its rate setting authority." CP 1746.

2. The City of Lake Forest Park.

On January 28, 1999, Lake Forest Park's City Council passed Ordinance No. 779, granting SCL the right to provide electrical utility service within Lake Forest Park free of the threat of competition from or exclusion by Lake Forest Park and a non-exclusive Franchise to construct, maintain, operate, replace, and repair an electric light and power system in, across, over, along, under, through, and below certain designated public rights-of-way of Lake Forest Park. CP 368-387. The term of the Franchise is 15 years.

3. The City of Burien.

The City of Burien incorporated in 1993. At the time of incorporation the City was exploring the options it had available to best serve its citizens in a variety of areas. CP 1706 at ¶ 3. One such area was the provision of electricity. At the time of incorporation, both Seattle City Light and Puget Sound Energy ("PSE") served Burien. Burien was unhappy with the service it received from SCL and in addition was looking for ways to raise revenue. *Id* at ¶ 4.

The City management team considered various options related to securing funds for Burien. The two options that were discussed were imposing a utility tax on electric utilities, including SCL, as well as starting their own municipal electric utility. CP 1025 at ¶ 3; CP 1706 at ¶

5; CP 1642-43. The City Manager had several conversations with the Mayor of Burien about this issue and he was very interested in keeping the option of municipalizing the utility available. *Id.* The Mayor of Burien at the time worked for the Department of Energy and was well versed in utility issues. *Id.* The strategy Burien devised was to impose a utility tax as the first step and if that failed, either legally or politically, begin the feasibility phase of creating a municipal utility. *Id.* This strategy was shared in meetings with the management of SCL in approximately 1995. *Id.* When the City implemented phase one of its strategy and passed an ordinance establishing a utility tax that covered SCL in December of 1995, it got the attention of SCL. *Id.*; CP 1644-1649.

Following the passage of this ordinance, Burien had several meetings with SCL regarding its position. CP 1706 at ¶ 10. Burien again reiterated that if this measure were not ultimately successful, it would pursue other options including starting its own utility. At the time, this appeared to be an important part in bringing SCL to the table to discuss the service it provided to Burien's citizens. CP 1707 at ¶ 11. Discussions from that point forward were productive; thus, it was not necessary for Burien to go to the next step of commissioning a utility feasibility study. *Id.* However, if SCL had not agreed to discuss the franchise terms with Burien, the City was fully prepared to implement the second phase of their

strategy. *Id.* at ¶ 12. On January 1, 1999, SCL and Burien entered into a franchise agreement, which included the service provisions at issue in this case.

4. The City of SeaTac.

At the time of negotiations with SCL, SeaTac was aware that it could form its own municipal electric utility. CP 142 at ¶ 3. In fact, Donald Monaghan, Assistant Public Works Director at the time of the negotiations, had some preliminary discussions with several Public Works officials in various South King County cities regarding the potential of electric utility municipalization. *Id.*; CP 1708-1709. However, SeaTac did not formally undertake an in-depth study of this issue because SCL commenced negotiations with SeaTac. CP 1942 at ¶ 4.

As part of the agreement between SeaTac and SCL, SCL agreed to make payments to SeaTac in exchange for SeaTac agreeing not to form its own municipal utility. CP 1944-1949; 1950-1967. It was SeaTac's understanding that municipalization was a real concern of SCL, because if SCL lost SeaTac ratepayers, capital costs incurred by SCL would be spread over a smaller rate base. CP 142. On November 30, 1999, SeaTac's City Council passed Ordinance No. 99-1043 granting SCL a Franchise which included the service provisions at issue in this case.

5. The City of Tukwila.

The City of Tukwila clearly contemplated starting its own utility in conjunction with other suburban cities and this was the impetus for the negotiations with SCL regarding the current franchise agreement. Unlike the other cities in this litigation, Tukwila had a 50-year franchise with SCL, which began in 1958. This franchise was still in effect at the time the negotiations discussed *infra.* were occurring. Tukwila is served both by Puget Sound Energy as well as Seattle City Light. CP 1477. Between 2001 and 2003 Tukwila was growing increasingly unhappy with the service it was receiving from both PSE as well as SCL. *Id.*

The problems arose with both electric utility companies primarily when the City wanted to change from overhead electric lines to underground facilities during the course of a road construction project. Both PSE and SCL believed that they were the only entities that could design and install the undergrounding facilities. Problems arose in getting the two organizations to work together. PSE and SCL refused to coordinate with the construction contractor that the City hired. This increased project costs significantly and the City had had enough. CP 1484-85.

Tukwila was not alone in dealing with poor service issues. A number of the cities in the South King County area were experiencing

similar problems and as a result, got together and said, “enough is enough.” *Id.* These cities included the cities of Tukwila, Renton, Federal Way, SeaTac, Burien, Auburn, and Kent. CP 1485, 1491; CP 1708-09. They collectively entered into negotiations with PSE to change the entire process. CP 1485-86.

During the course of those negotiations, the cities met and discussed their options. It was brought up at these regular meetings that one option would be, if a resolution were not forthcoming, that they form a collective South County electric utility. *Id.*; CP 1473-1502. There was agreement between the cities to begin exploring that option, with the City of Kent acting as the lead agency. The Mayor for the City of Tukwila authorized the City’s Public Works Director to join in this effort. CP 1491. The City Council for the City of Kent appropriated \$100,000 to begin the feasibility study. CP 1709 at ¶ 4; 1712. As part of that feasibility phase, the City of Kent received information from American Energy regarding the feasibility of starting a utility. CP 1709. These consultants provided information and a power point presentation, which demonstrated that although there are hurdles in forming a utility, it can be done by municipalities and can be successful. *Id.* In addition, this group of suburban cities also had an attorney from Preston Gates & Ellis, Carol Arnold, consulting with them regarding the feasibility of forming a south

county suburban utility. CP 1485-86.

The option of forming a south county utility was presented to PSE in the negotiating sessions. *Id.* This fact got the attention of PSE and from that point forward they were willing to seriously consider the cities' concerns. *Id.*

During negotiations with PSE, Tukwila opened up discussions with SCL regarding operating concerns. The Franchise was set to expire in 2008, and Tukwila believed it was a good time to discuss the terms of their Franchise with SCL. The City of Tukwila wanted to address these serious service issues and initially met with some resistance from SCL negotiators. Thus, Jim Morrow, the Tukwila Public Works Director, again introduced the option of the City forming its own utility in conjunction with other cities. CP 1486-91. Again, as with PSE, this resulted in SCL negotiating in a more cooperative manner and ultimately culminated into an acceptable agreement for the City of Tukwila. CP 1477.

C. Procedural History.

On July 27, 2005, this class action case was commenced in King County Superior Court. CP 1-26. On November 7, 2005, the trial court issued an Order maintaining the case as a class action on behalf of the class of persons who were SCL ratepayers who resided in the City of Seattle. CP 354-355. The Court excluded from the class SCL ratepayers

who resided outside of the City of Seattle.⁴

On February 17, 2006, the Court heard oral argument regarding Lake Forest Park's motion to dismiss, Suburban Cities' motion to strike exhibits, Appellants' motion for partial summary judgment and Respondents' cross-motion for summary judgment. The cities of University Place and Lakewood filed motions to file amicus briefs in support of the Respondents Suburban Cities. On February 23, 2006, the Court entered an Order denying the Appellants' motion for summary judgment, and granting summary judgment in favor of Respondents and dismissing the Appellants' complaint. CP 2001-2009.

IV. ARGUMENT

A. Standard of Review on Appeal.

1. Summary Judgment Order.

Appellate review of a decision to grant summary judgment is de novo, in that an appellate court engages in the same inquiry as the trial court; that is: Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267,

⁴ The trial court certified the class with respect to ratepayers within Seattle only.

278, 937 P.2d 1082 (1997) (*quoting* CR 56(c)). A material fact is one on which the outcome of the case depends. *Atherton Condo. Ass'n. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Suburban Cities agree with Appellants that there are no material facts in issue and summary judgment is appropriate.

2. Class Certification Order.

The Suburban Cities also agree with Appellants that appellate review of the trial court's class certification decision is for abuse of discretion. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820-21, 64 P.3d 49 (2003) (*citing Oda v. State*, 111 Wn. App. 79, 90, 44 P.3d 8, *rev. den'd*, 147 Wn.2d 1018, 56 P.3d 992 (2002)). A court abuses its discretion if its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. *Id.*

B. This Case is Governed By Contract Principals: The Washington State Legislature Has Granted Cities Broad Authority to Enter Into Franchise Agreements and Other Contracts.

A franchise is "the right of a public utility to make use of the city streets for the purpose of carrying on the business in which it is generally engaged, that is, of furnishing service to members of the public generally." *Wash. Fruit & Produce Co. v. City of Yakima*, 3 Wn.2d 152, 157-58, 100 P.2d 8 (1940). The power to grant franchises is a sovereign power of the

state that may be delegated to cities. *General Telephone Co. of Northwest, Inc. v. City of Bothell*, 105 Wn.2d 579, 584, 716 P.2d 879 (1986). As code cities, the Suburban Cities have been delegated the authority to grant nonexclusive franchises for the use of its public ways, and specifically to grant franchises for the right to place poles, wires, and appurtenances for the transmission and distribution of electrical energy. RCW 35A.47.040.

Franchises, whether statutory or by ordinance, have the legal status of contracts, binding with equal force, according to the terms thereof, upon the granting authority and the granted entity. *Id.*; *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 577, 611 P.2d 741 (1980).⁵ Thus, it is a contract analysis which governs resolution of this matter.

1. Municipalities may enter into contracts without restriction.

The Suburban Cities are governed under the Optional Municipal Code, Title 35A RCW. The stated purpose of Title 35A RCW is to grant “the broadest powers of local self-government consistent with the Constitution of this state.” *City of Bellevue v. Painter*, 58 Wn. App. 839, 841, 795 P.2d 174 (1990); *see also* RCW 35A.01.010. Moreover, RCW 35A.01.010 states that “all grants of municipal power to municipalities electing to be governed under the provisions of this title . . . shall be

⁵ Franchises are also known as “contract ordinances,” although ordinance in form, contractual in nature. 5 *McQuillin Mun. Corp.* § 15:9 (3d. ed.)

liberally construed in favor of the municipality.”⁶ Emphasis added. One such enumerated power is the right to contract and be contracted with. RCW 35A.11.010.

Municipalities governed under the Optional Municipal Code are capable of entering into contracts without restriction. *U.S. v. Town of Bonneville*, 94 Wn.2d 827, 831, 621 P.2d 127 (1980); *see also Reiter v. Chapman*, 177 Wn. 392, 31 P.2d 1005; 92 A.L.R. 828 (1934); *Shaw Disposal, Inc., v. City of Auburn*, 15 Wn. App. 65, 546 P.2d 1236 (1976). “A municipal corporation is permitted to enter into contracts which are proper and reasonably necessary to enable it to perform fully the duties of local government.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 282, 937 P.2d 1082 (1997)).

2. RCW 35.21.860 does not infringe on the Suburban Cities’ broad authority to contract.

RCW 35.21.860 does not limit the Suburban Cities’ authority to contract. Adoption of Appellants’ proposed reading of the statute would result in the Court rewriting the statute so that it becomes a prohibition on cities’ authority to contract. Nothing in the language of the statute supports this result. The legality of service agreements should be measured by contract principles, not by an unreasonable reading of RCW 35.21.860.

⁶ The Suburban Cities herein are organized as Code Cities pursuant to RCW 35A.

The Suburban Cities were permitted to enter into franchise agreements and to include a service agreement within the Franchise. Further, SCL was not required to accept the contract terms included in the franchise agreement, but rather could have rejected or negotiated the terms, and did so in this case during the early rounds of negotiation. SCL and the Suburban Cities finally reached a mutual agreement on the terms of the franchise agreement, including the provision to compensate the Suburban Cities for not starting their own utility. As a result, the franchise agreement and service agreement were binding upon the Suburban Cities as well as SCL. The Suburban Cities were prohibited from starting their own utility, and SCL was required to pay the Suburban Cities consideration for the forbearance of a legal right. Forbearance from doing a lawful, authorized act is lawful consideration.

3. The cities gave up a valuable right to start their own electric utility and that forbearance is sufficient consideration to support the contract.

It is well settled in Washington that “[e]very contract must be supported by a consideration to be enforceable.” *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994) (citing *Dybdahl v. Continental Lumber Co.*, 133 Wn. 81, 85, 233 P. 10 (1925)). Consideration is any act, **forbearance**, creation, modification or destruction of a legal relationship, or return promise given in exchange. *Id.* (emphasis added). Any act or

forbearance which has been bargained for is consideration sufficient to support a promise. *State v. Brown*, 92 Wn. App. 586, 594 P.2d 1102 (1998); *Adams v. University of Washington*, 106 Wn.2d 312, 722 P.2d 74 (1986).

Here, it is undisputed that the Suburban Cities had the absolute right to form and operate their own utility. RCW 35A.80.010-020. If they had done so they would have received tax revenue based upon a percentage of the gross revenue of power and distribution portions of electric sales. RCW 35.21.870. It is further undisputed that a city is allowed to tax its own utility department. *Op. Atty. Gen 1990, No. 3*. Any such tax revenue could be deposited into the city's general fund. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001). Thus, this proprietary right is financially significant for municipalities.

These cities promised to refrain from forming their own utilities and in a bargained for exchange for that promise, SCL agreed to pay them as consideration for forbearance of their legal right.

Appellants claim the idea of starting a municipal utility was “fiction” and “hatched.” Brief of Appellants at 3 and 33. However, the Suburban Cities have set forth ample evidence that this was in fact a legitimate concern for SCL. CP 1527, 1529, 1532-1546; CP 1706 at ¶ 914-5.

Several witnesses testified at depositions that during the time these franchise agreements were negotiated, the utility industry was experiencing deregulation. CP 1503-1506, 1509-1510, 1514-1516. In addition, the Suburban Cities were dissatisfied with the services provided by SCL and PSE. CP 1706; CP 1477-86. These factors propelled the discussions between the Suburban Cities to form their own municipal utility. By forming their own utility, the Suburban Cities would be able to manage the service provided by the utility and receive tax revenue. These benefits were quite appealing to the Suburban Cities, and created a difficult obstacle for SCL to overcome.

4. The contracts are not ambiguous and thus must be interpreted on their face.

Appellants are asking the court to consider evidence outside of the four corners of the contract and to ignore the fact that extrinsic evidence cannot contradict or supplement an integrated and unambiguous instrument. 25 David K. DeWolf et al., *Washington Practice: Contract Law and Practice* § 5.5, at 119 (1998) (footnotes omitted). The Washington Supreme Court follows the “objective manifestation theory of contracts.” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this approach, the court’s role is to determine the parties’ intent by focusing on the objective manifestations of

the agreement, and imputing an intention based on the reasonable, ordinary, usual and popular meaning of the words used. *Id.* at 503-504. Extrinsic evidence is to be used only to determine the meaning of specific words used in a contract. *Id.* at 503. It should not be used to show evidence of one party's unilateral or subjective intent about the meaning of the contract. *Id.* Here, neither party to any of the agreements seeks to vary the contractual terms.

In *Hearst*, the court clarified its "extrinsic evidence" decision in *Berg*. Reaffirming the context rule of interpreting⁷ contracts, the court:

recognized that intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution. ***If relevant for determining mutual intent,*** extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties.⁸

The *Hearst* court emphasized, however, that surrounding circumstances and other extrinsic evidence are to be used "to determine the meaning of

⁷ "Interpretation" of contracts is the process of ascertaining the meaning of language in the document by examining objective manifestations of the parties' intent. "Construction" is the process of applying relevant legal principles to the circumstances of a case to determine the legal consequences of the words. *Hearst*, 154 Wn.2d at 493, n.9.

⁸ *Hearst*, 154 Wn.2d at 502, citing *Berg* at 667, quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973) (emphasis added).

specific words and terms used and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” *Id.* at 503 (emphasis in original). The context rule does not allow extrinsic evidence “to emasculate the written expression” of the meaning of contract terms, nor can it be used to show intention independent of the contract. *Id.* Subjective intent “is generally irrelevant if the intent can be determined from the actual words used.” *Id.* at 504. The court generally gives words their ordinary, usual, and popular meaning. *Id.*

In the instant case, the contract term at issue is a clear expression of forbearance. The threshold inquiry is whether the contract, on its face, is unambiguous and fully integrated. If that threshold is met, the court’s inquiry is at an end. *Mayer v. Pierce County Medical Bureau Inc.*, 80 Wn. App. 416, 909 P.2d 1323 (1995). The law is clear, in construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. *Id.*

C. The Suburban Cities Did Not “Impose” a Franchise Fee or Any Other Fee or Charge Upon SCL, But Entered Into a Mutually Negotiated Service Agreement.

RCW 35.21.860 is plain and unambiguous and should be interpreted on its face. When interpreting a statute, the court first looks to

the plain meaning of words used in the statute. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). The court may give a non-technical statutory term its dictionary meaning. *Id.* at 835. If the statutory language is clear and unambiguous, we assume the legislature meant exactly what it said and determine the meaning of the statutes from their language alone. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997); *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708 985 P.2d 262 (1999).

Pursuant to RCW 35.21.860, “No city or town may **impose** a franchise fee or any other fee or charge of whatever nature or description **upon** the light and power . . . businesses.” Emphasis added. The term “impose” means “[t]o levy or exact as by authority; to lay as a burden, tax, duty or charge.” BLACK’S LAW DICTIONARY 680 (5th ed. 1979).⁹ And, according to Merriam-Webster’s Collegiate Dictionary (11th ed.), to

⁹ Appellants argue that “impose” is also used in connection with contractual obligations. This is undeniably true; however, contractual obligations are founded on mutuality and consideration. The obligation is “imposed” by the law of contract, not by one of the parties to the contract. More importantly, the cases relied upon by the Appellants examine the phrase “imposed *by* contract.” This misses the mark. The phrase at issue in this case is “imposed . . . *upon*.” These are two very different concepts and not analogous. RCW 35.21.860 does prohibit unilateral imposition of an obligation by a city or town, not imposition by a mutually negotiated franchise or contract. It makes no reference to contacts and it does not prohibit mutual exchanges of consideration.

“impose” means to establish or apply by authority.¹⁰

Appellants argue that payments made by SCL to the Suburban Cities pursuant to the service agreement provision of the Franchise must be returned to SCL ratepayers because those payments are imposed on SCL and thus violate RCW 35.21.860. However, the service agreement is not a franchise to use rights-of-way, and the payment is not for administrative costs of the franchisor associated with managing the franchise operations or for rental value of the rights-of-way.¹¹

Appellants claim RCW 35.21.860 renders payments required by a service agreement between the Suburban Cities and SCL unlawful because the agreement is associated with the Franchise, without regard to whether the payments are unilaterally imposed or negotiated in exchange for lawful consideration. The franchise agreements entered into between SCL and the Suburban Cities did not provide for any of the cities to “impose” a

¹⁰ Appellants allege Seattle and the Suburban Cities’ use, at the lower court, of the Merriam-Webster Online Dictionary was improper. Appellants’ Brief at 27. However, the Merriam-Webster Online Dictionary is identical to the print version of Merriam-Webster’s Collegiate Dictionary, which has been cited in several reported cases. *See e.g. State v. Borrero*, 147 Wn.2d 353, 58 P.3d 245 (2002); *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 908, 48 P.3d 334 (2002); *State v. J.R. Distributors Inc.* 82 Wn.2d 584, 637, 512 P.d 1049 (1973). Further, there do not appear to be any Washington State cases stating a preference of one dictionary over another. “When a statute fails to define a term, a court may rely on the ordinary meaning of the word as stated in a dictionary.” *State v. Klein*, 156 Wn.2d 103, 124 P.3d 644 (2005) (emphasis added).

¹¹ *City of Lakewood v. Pierce Co.*, 106 Wn. App. 63, 77-8, 23 P.3d 1 (2001) (Franchise fees are in the nature of rental for the use and occupation or right-of-way and to recoup administrative costs).

franchise fee or any other fee or charge upon SCL. Rather, the franchise agreements provided that SCL would make payments to the Suburban Cities in consideration for their forbearance of asserting a valid legal right.

Because the language of RCW 35.21.860 is unambiguous, its meaning must be derived from its language alone. Its scope is limited to prohibiting a city from “imposing” a fee or charge upon an electric utility. Appellants allege RCW 35.21.860 prohibits the Suburban Cities from receiving any type of payment from SCL unless it falls within one of the enumerated exceptions listed in RCW 35.21.860. CP 405. However, this interpretation disregards the plain and unambiguous language of the statute. In the present case, there is no evidence that the Suburban Cities unilaterally “imposed” any type of fee or charge upon SCL. Rather, the evidence clearly indicates that under the franchise agreements the consideration payment was reached through extensive arm’s-length negotiations and the service agreement provided mutual benefits to the parties, as well as their respective citizens and ratepayers. The statute does not prohibit a city from collecting payments made by an electric utility pursuant to a negotiated service agreement since such payments are not properly considered as “lev[ied] or exact[ed] as a by authority” or “[a]s a burden, tax duty or charge.” *See* BLACK’S LAW DICTIONARY

680 (5th ed. 1979).¹² Had the legislature intended the overreaching result urged by the Appellants, it would have provided that a city shall not “receive” any payments of any nature from a light and power business. It did not. It chose the phrase “impose upon” and the legislature is presumed to know the meaning of the words used in writing its enactments. *State v. Zornes*, 78 Wn.2d 9, 19, 475 P.2d 107 (1970).

Appellants cite several cases and statutory authority for the proposition that a duty or obligation can be “imposed by contract.” Brief of Appellants at 28. However, the fact that Appellants plucked the language “imposed by contract” from various cases and statutory authority, without any application to the present facts, does not support Appellants’ argument that the consideration payment was “imposed upon” SCL. The cases cited by Appellants are factually distinguishable, and should not be taken out of context. These cases address only the imposition of a duty by contract or statute and do not address the “imposed upon” language at issue in this

¹² Shoreline Municipal Code 12.25.090 is likely the type of imposed franchise fee contemplated by RCW 35.21.860. It is a prerequisite to the city considering a franchise application and entering into a franchise agreement. It requires that “[a]ll franchise agreements executed by the city shall include terms requiring a grantee to pay a fee. . . . Said franchise fee shall provide the city with compensation equal to six percent of the gross revenues generated by the grantee within the city unless limited by state or federal law.” Emphasis added. Appendix A. Since this fee was prohibited by RCW 35.21.860 it was not required of SCL in the Shoreline franchise.

case.¹³

1. The consideration called for in the contract is not a “franchise fee” as contemplated by RCW 35.21.860.

Appellants argue that because the agreements between the Suburban Cities and SCL are titled franchise agreements, any payment made pursuant to that contract is a franchise fee. CP 405-06. This interpretation is not supported by any legal authority. The mere fact that the agreement entered into between SCL and the Suburban Cities was titled a franchise agreement does not automatically transform all payments made under that agreement into franchise fees. The Suburban Cities have set forth sufficient evidence and the plain language of the agreement demonstrates that the payments made by SCL are in consideration for the Suburban Cities’ promise to forgo forming their own utility, not for use of the public rights-of-way in the Suburban Cities. Simply because a franchise fee cannot be imposed on an electric utility does not preclude other negotiated considerations. Further, where a contract is open to two constructions, one of which would make the

¹³ In *Tri-City Const. Council, Inc. v. Westfall*, 127 Wn. App. 669, 112 P.3d 558 (2005), defendant was a member of a “retrospective rating plan” sponsored by plaintiff. As a sponsor, plaintiff was required by state law to make payments to the Department of Labor and Industries on behalf of its members, and to collect reimbursements from its members. Defendant failed to reimburse plaintiff, and as a result plaintiff brought suit for equitable subrogation. The court held that plaintiff performed a legal duty **imposed by state law**, and as a result was entitled to equitable subrogation.

Similarly, in a negligence action, *Sheridan v. Aetna Casualty & Surety Co.*, 3 Wn.2d 423, 425, 100 P.2d 1024 (1940), the court was discussing the gratuitous assumption of a duty to conduct a proper inspection and whether that duty was imposed by an insurance policy. One could hardly argue that the terms of an insurance contract are mutually negotiated; *see also* fn. 9.

contract lawful and the other unlawful, the court will adopt the lawful interpretation. 17A *Am.Jur.2d Contracts* § 340 (204); 11 *Williston on Contracts* § 32.11 (4th ed. 1999). As a result, RCW 35.21.860 is inapplicable to the payments made by SCL to the Suburban Cities and the Appellants have failed to carry their burden on this issue.

2. Cities are permitted to collect payments from electric utilities pursuant to negotiated service agreements.

Although no Washington appellate court has addressed the precise issue of whether a city may lawfully collect payments from an electric utility pursuant to a negotiated service agreement included in a franchise, the general principle is that collection is permissible. 12 *McQuillin Mun. Corp.* § 34:53 (3d. ed.). RCW 35.21.860 does not prohibit related agreements between parties to a franchise, even if that agreement is included in the franchise document.

For example, in *Florida Power Corp. v. City of Winter Park*, 827 So.2d 322 (Fla. 2002), Florida Power and the City of Winter Park entered into a negotiated franchise agreement, which required Florida Power to pay the city six percent of gross receipts based on the sale of electricity within the city. *Id.* at 323. Following the expiration of the franchise agreement, Florida Power continued to operate as though the franchise agreement was still in existence, but refused to pay the previously

negotiated fee. *Id.* When the city filed suit to compel payment, Florida Power claimed the city's attempt to collect payment following the expiration of the parties' franchise agreement constituted the unilateral imposition of a new "fee." *Id.*

In *Florida Power*, the court distinguished the case before it from *Alachua County v. State*, 737 So.2d 1065 (Fla. 1999), in which the Florida Supreme Court held that the unilateral imposition of a fee charged to a franchisee for the use of public property which is unrelated to the cost of maintaining such public property is an unconstitutional tax. Specifically, the court explained:

A reading of *Alachua* convinces us that its result would have been different had the fee charged by the County in fact been based on a previously negotiated fee for the franchise rights agreed to by the parties. In other words, **if a franchisee and a governing body agree to a reasonable fee for access to the city's residents and the use of the public property to provide services during the term of the franchise then such fee has not been "unilaterally imposed"** and will be enforceable during a holdover period in which renegotiation occurs. In this case, Florida Power does not challenge the reasonableness of the franchise even during these stalemate negotiations. To interpret *Alachua* as Florida Power suggests would mean that any franchise negotiated by the parties which is not directly related to the cost of providing maintenance to the franchise property is invalid and

unenforceable.

Id. at 324 (emphasis added).

The *Florida Power* case stands for the principle that a reasonable fee, which may not be unilaterally imposed by a city upon an electric utility, may nevertheless be lawfully collected pursuant to the parties' negotiated agreement.

Like *Florida Power*, this case involves a negotiated agreement between a city and an electric utility, which requires the utility to pay a percentage of the amount of revenue derived from the sale of electricity within the city. As in *Florida Power*, the validity of payments depends upon whether they were "imposed." It is undisputed that they were not. Thus, the Court should follow the principle set forth in *Florida Power* and rule that the payments made by SCL to the Suburban Cities were not unilaterally imposed and, consequently, fall outside the scope of RCW 35.21.860. This conclusion is consistent with the statute's plain language, which limits its scope to unilaterally imposed fees and charges, as well as the general principle that the terms of a franchise must be negotiated. *Lakewood v. Pierce County*, 106 Wn. App. 63, 74, 23 P.3d 1 (2001) (recognizing that a city cannot compel the utility to accept its terms for the continued occupation of the streets).

3. City employees' "shorthand" for the payments made pursuant to these franchise agreements have no legal effect.

Appellants make much of the occasional shorthand reference to the SCL payments as franchise fees. These casual and unreliable references are not good evidence of the meaning of the franchise even if the contract were ambiguous. Appellants' reliance on this "evidence" is misplaced. The shorthand of an employee in the City's finance department cannot override the clear intent of the parties who negotiated the agreements. Those who referred to these payments as "franchise fees" are not municipal lawyers with the expertise to understand the subtleties of the nomenclature in this context. These are hard working city employees who understand that the money is received pursuant to a franchise contract,¹⁴ hence the term "franchise fee." CP 1655-1662; CP1032-1033. The substance of the term cannot be obfuscated by layperson terminology. While the terminology used by City employees is imprecise, the franchise agreement leaves no room for debate – the payments are for very specific forbearance.

¹⁴ Appellants also point to various documents which describe the transaction with SCL as a utility tax or tax-sharing. Similarly, the contract provision cannot be altered by the title of an internal memorandum. The consideration term is unambiguous and not subject to construction by extrinsic evidence. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 909 P.2d 1323 (1995).

D. The Trial Court Did Not Abuse Its Discretion in Limiting the Class to Seattle City Light Ratepayers Residing in Seattle.

The trial court did not abuse its discretion in limiting the certified class to only ratepayers residing in Seattle. A class certification decision will be reversed “if the trial court ‘made its decision without appropriate consideration *and articulate reference to* the criteria of CR 23.’” *Miller*, 115 Wn. App. at 820 (*quoting Washington Educ. Ass’n v. Shelton Sch. Dist.* 309, 93 Wn.2d 783, 793, 613 P.2d 769 (1980) (emphasis in original)).

The trial court correctly found that ratepayers who reside outside of Seattle have different interests in the outcome of the case; that the facts and defenses differ materially among the ratepayers of each city; and that ratepayers who are Seattle residents “cannot adequately and fairly protect the interests of ratepayers who reside outside the City of Seattle.” CP 355. The evidence showed that the interests of Seattle ratepayers and Suburban City ratepayers are not the same. The Suburban City ratepayers have an interest in maintaining the terms of the franchise agreements as they presently exist. The evidence showed that by maintaining the franchise agreements, the ratepayers are assured of a reasonably low cost of electric service. CP 1473-1502 (representative agreement between Tukwila and

Seattle City Light).¹⁵ By the terms of this agreement, the City of Tukwila has the ability to terminate the entire agreement if the consideration portion of the agreement is found to be invalid. It is likely, due to the materiality of the consideration provision to the agreement, that many of the Suburban Cities would in fact terminate their agreements with SCL. Should these agreements be terminated or renegotiated, ratepayers in the suburban jurisdictions would be harmed. CP 129-138; 139-158.

In contrast, Appellants presented no support for their contention that all ratepayers' rates would drop rather than rise as a result of this action. In fact, the evidence demonstrated that it is likely that rates would increase and service would decrease. CP 130-31 at ¶¶ 7-8. Thus, the trial court correctly ruled that Appellants failed to demonstrate that they meet the typicality prong of the analysis under CR 23.

1. The trial court correctly ruled that Appellants have interests antagonistic to the Suburban Cities ratepayers.

To begin, one of the primary elements of the “adequacy” element requires that the representatives have no interest that conflicts with the interests of the class. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). Conflicting or antagonistic interests may render a class action an improper vehicle for seeking vindication of a given right. *Id.* (citing *Anderson v. Moorer*, 372 F.2d 747 (5th Cir. 1967)). Thus, when the

¹⁵ The Suburban Cities all have similar, if not identical, franchise agreements with SCL.

interests of the class representative can be pursued only at the expense of the interests of the class members as they do in this case, and resulting conflict cannot be abated, then the representatives are inadequate. 1 *Newberg on Class Actions*, § 3:26 (4th ed. 2002).

This issue of conflicting interests has been the subject of several class action suits and in those cases the courts have determined that dissension by some class members is enough to preclude the class action. *Alston v. Virginia Highschool League, Inc.*, 184 F.R.D. 574, 43 Fed. R. Serv. 3d 403 (W.D.Va. 1999) (representatives not certified for class action under a Title IX claim alleging discrimination against female athletes since not all class members agreed with the position or the proposed changes); *Gilpin v. American Federation of State, County and Municipal Employees AFC-CIO*, 875 F.2d 1310 (7th Cir. 1989) (court did not certify non-union employees challenging deduction of union's agency fee since only the interest of the hostile group was represented, not the ambivalent group); *In re Northern District of California, Dalkon Shield IUD Product Liability Litigation*, 693 F. 2d 847 (9th Cir. 1982), as amended (July 15, 1982) (plaintiffs successfully moved to decertify class that was certified by the court sua sponte).

The record shows that the franchise agreements provide many benefits to the Suburban Cities that have a likelihood of being terminated

or diminished if these agreements are held to be invalid. CP 129-32; CP 139-42. The benefits are threefold – rate based, service based, and protection based. CP 131 at ¶ 5.

2. The trial court correctly ruled that the relevant facts and defenses differ materially among the ratepayers of each city.
 - a. The Suburban Cities' ratepayers would be exposed to potentially higher rates.

The current franchise agreement between SCL and the Suburban Cities contains a provision for a cap of an eight percent differential in the rates charged to suburban customers compared to the power portion of the rates charged to similar customers in Seattle. This is a great benefit to the ratepayers in the Suburban Cities as there is no similar rate cap with the other electric service provider in our area, PSE, and without the franchise agreement the ratepayers are without any specific assurance regarding their rates. CP 130-31 at ¶¶ 6-7; CP 140 at ¶¶ 5-6.

Further, due to the existence of the current franchise agreement with SCL, Tukwila, for example, charges SCL \$100.00 per permit application, which is a reduced rate from the typical \$250.00 charge; if the permit fees were to increase due to the lack of a franchise agreement or a different franchise agreement, SCL operational costs would likely go up which would be passed along to ratepayers. CP 130-31 at ¶ 7.

b. Service would decrease for the ratepayers of Suburban Cities.

Moreover, the service contemplated by the franchise agreement and actually provided by SCL is not found with the other service provider in the Suburban Cities. If the franchise agreements were terminated or re-negotiated, it is likely that the Suburban Cities' ratepayers would suffer a significant lack of service. CP 131 at ¶ 8-9; CP 140 at ¶¶ 5 and 8.

In addition, the City of Tukwila, again by way of representative example, has a policy, based on citizen input, that undergrounding utilities is a priority for the City. The current franchise agreement makes the cost of undergrounding less than without the franchise agreement. The parties have agreed that Tukwila can design and build the facilities needed for the undergrounding project. This is unique to the franchise agreement with SCL. The effect of this provision is to streamline the process and lower the cost for ratepayers. It also speeds up the undergrounding project and provides faster service to the ratepayers in Tukwila. CP 131 at ¶ 8.

In many of the Suburban Cities, PSE is the other primary electric provider. Unlike PSE, SCL is not bound by the Washington State Utility Trade Commission ("UTC") and their cumbersome and often onerous regulations. As a result, ratepayers receive service that is more responsive. Because the UTC binds PSE, it is unable to offer such

service-oriented rates as SCL, which allows each jurisdiction to pay for those items important to their specific ratepayers. *Id.*

- c. The Suburban Cities would lose many of the protections afforded to them through the franchise agreement.

Finally, the franchise agreement with SCL offers protections to suburban ratepayers that are not afforded in other agreements. For example, the franchise agreement requires that SCL appoint a member nominated by the Suburban Cities to its Citizen Rate Advisory Committee who will represent the interests of Suburban Cities served in whole or in part by SCL. CP 163 at § 4.1.5.

Also, by way of example, the franchise agreement grants Tukwila the ability to have its City Council establish policies regarding the implementation of SCL service requirements. SCL shall assist the City Council in establishing these policies and in determining the impact, if any, such policies may have upon SCL customers within the City limits. *Id.*

There is ample support in the record that the trial court made its decision limiting the class to ratepayers within Seattle based on careful consideration of the evidence and appropriate consideration and articulate reference to the criteria of CR 23. The Court's decision was based on

solid grounds, and was not manifestly unreasonable or arbitrary; thus, the decision must be upheld.

V. CONCLUSION

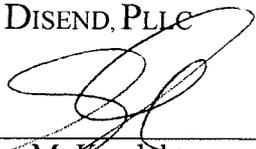
The terms of the franchise agreements are clear. They are not ambiguous nor are they susceptible to more than one meaning. As a result, the Court must interpret the contract on its face. The Suburban Cities gave up a very valuable right in the course of their negotiations with SCL and they have the obligation to be compensated for the forbearance of that right. This is valid consideration and the agreements should be upheld.

In addition, the record is clear that no franchise fees or other charges were imposed on SCL relative to the grant of the Franchise. The agreements are unambiguous regarding the nature of the payments made, they were negotiated, and not imposed by municipal authority and are therefore not prohibited by RCW 35.21.860.

Finally, the trial court did not abuse its discretion in limiting the class to only ratepayers within Seattle. The findings below were based on consideration of the evidence and appropriate consideration and articulate reference to the criteria of CR 23.

DATED this ____ day of July, 2006.

KENYON DISEND, PLLC

By 

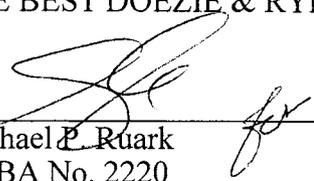
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CITY OF SEATAC

By 

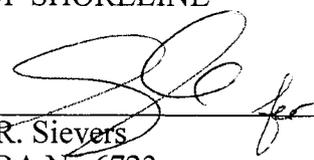
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SUPREME COURT
STATE OF WASHINGTON

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH
GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of
the class of all persons similarly situated,

Appellants,

vs.

THE CITY OF SEATTLE, THE CITY OF SHORELINE, THE CITY OF
BURIEN, THE CITY OF LAKE FOREST PARK, THE CITY OF
SEATAC and THE CITY OF TUKWILA,

Respondents.

APPENDIX TO BRIEF OF RESPONDENTS CITIES OF BURIEN,
SHORELINE, LAKE FOREST PARK, SEATAC, AND TUKWILA

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Appendix A Shoreline Municipal Code 12.25.090A-1

12.25.090 Franchise fee.

A. All franchise agreements executed by the city shall include terms requiring a grantee to pay a fee in consideration of the privilege granted under a franchise agreement to use the public right-of-way and the privilege to construct and/or operate in the city. Said franchise fee shall provide the city with compensation equal to six percent of the gross revenues generated by the grantee within the city unless limited by state or federal law; provided, however, that this fee may be offset by any utility tax paid by grantee or in-kind facilities or services provided to the city. Any grantee that does not provide revenue-generating services within the city shall provide alternate compensation as set out in the franchise agreement.

B. In the event that any franchise payment is not received by the city on or before the applicable due date, interest shall be charged from such date at the statutory rate for judgments.

C. In the event a franchise is revoked or otherwise terminated prior to its expiration date, a grantee shall file with the city, within 90 days of the date of revocation or termination, a verified or, if available, an audited financial statement showing the gross revenues received by the grantee since the end of the previous year and shall make adjustments at that time for the franchise fees due up to the date of revocation or termination.

D. Nothing in this chapter shall limit the city's authority to tax a grantee, or to collect any fee or charge permitted by law, and no immunity from any such obligations shall attach to a grantee by virtue of this chapter. [Ord. 244 § 1, 2000; Ord. 221 § 1, 1999; Ord. 83 § 9, 1996]

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